

## Legal Reimbursement Claims by ERISA Plan Fiduciaries

Brian A. Pérez-Daple†

Consider the following scenario:<sup>1</sup> An individual takes a job and enrolls in his employer's employee healthcare benefit plan, which is regulated by the Employee Retirement Income Security Act<sup>2</sup> (ERISA). Like many such benefit plan agreements, this plan contains a reimbursement provision; the provision requires the employee to reimburse the benefit plan for any benefits paid to the employee for an injury caused by a third party in the event (and to the extent) that the employee is able to recover from the party at fault.<sup>3</sup> While still covered by the plan, the employee has an accident caused by another party and suffers extensive injuries. The plan pays for the employee's medical expenses, but the employee also sues the party at fault. The court awards a judgment that exceeds the employee's medical expenses.<sup>4</sup> The employee, however, refuses to reimburse the plan and spends the award money otherwise.

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† A.B. 2003, Princeton University; J.D. Candidate 2006, The University of Chicago.

<sup>1</sup> The facts of this hypothetical closely parallel those in *Providence Health Plan v McDowell*, 385 F3d 1168 (9th Cir 2004), cert denied, 125 S Ct 1726 (2005) and 125 S Ct 1735 (2005).

<sup>2</sup> Employee Retirement Income Security Act of 1974, 29 USC § 1001 et seq (2000). An "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or . . . both." 29 USC § 1002(3). Welfare benefit plans are those maintained by an employer to provide for the medical or other current needs of employees and their selected beneficiaries, while pension benefit plans are those maintained to provide retirement income to employees. 29 USC § 1002(1)–(2). This hypothetical employee's enrollment in the benefit plan makes him a plan participant, eligible to receive benefits from his employee benefit plan. 29 USC § 1002(7) (defining "participant"). ERISA defines a plan "beneficiary" as "a person designated by a participant . . . who is or may become entitled to a benefit" under the plan. 29 USC § 1002(8). For the purposes of this Comment, however, there is no need to distinguish between "participants" and "beneficiaries," and therefore both are described by the term "beneficiaries."

<sup>3</sup> For an example of such a subrogation provision, see *Great-West Life & Annuity Insurance Co v Knudson*, 534 US 204, 207 (2002) ("[T]he Plan shall have 'the right to recover from the [beneficiary] any payment for benefits' paid by the Plan that the beneficiary is entitled to recover from a third party.").

<sup>4</sup> Although in the hypothetical the at-fault third party compensated the beneficiary, Social Security or any other source of compensation is sufficient for the purpose at hand. What is essential is that the beneficiary be compensated again by some nonplan entity for the same injury and expenses the benefit plan originally covered.

To collect the amount due the plan fiduciary<sup>5</sup> decides to sue the employee, but ERISA itself proscribes the available claims. For example, the fiduciary may not assert an equity-based restitution claim under state law<sup>6</sup> because ERISA's civil enforcement provision preempts such a claim.<sup>7</sup> The fiduciary likewise will be prevented from bringing a breach of contract claim under ERISA itself because the civil enforcement provision allows plan fiduciaries to obtain equitable relief only when enforcing any provision of the plan.<sup>8</sup> For the fiduciary, one obvious alternative remains: a legal (as opposed to equitable) breach of contract claim against the employee based on state law rather than ERISA.

But does ERISA preempt a state law breach of contract claim?<sup>9</sup> This Comment examines the Supreme Court's ERISA preemption and civil remedy jurisprudence and concludes that it allows ERISA plan fiduciaries to enforce reimbursement provisions in state law breach of contract suits. Allowing fiduciaries to sue under state law comports with the Court's reexamination of ERISA preemption in

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<sup>5</sup> An ERISA fiduciary is any person who exercises discretionary authority or control respecting the management or administration of a benefit plan, or exercises authority or control over the disposition of plan assets. 29 USC § 1002(21)(A). ERISA plan fiduciaries are so named because ERISA requires all assets of employee benefit plans to be held in trust. 29 USC § 1103(a). ERISA transposed trust fiduciary law into the regulatory context, requiring all aspects of plan administration to be governed by the trust fiduciary principles of loyalty and prudence. 29 USC § 1104(a)(1)(A)–(B). ERISA fiduciaries may be, and often are, ERISA employer personnel, in contrast to traditional trust law's requirement that fiduciaries be disinterested intermediaries. 29 USC § 1108(c)(3) (permitting plan fiduciaries to serve as officers, employees, or agents of parties in interest in ERISA regulation and litigation).

<sup>6</sup> This hypothetical assumes that a court might consider a claim for reimbursement like the one contemplated here to be equitable. For reason to doubt that such a claim could adequately be formulated, see *Knudson*, 534 US at 214 (finding that a claim much like the one described in this hypothetical sought legal but not equitable restitution).

<sup>7</sup> See *Aetna Health Inc v Davila*, 542 US 200, 124 S Ct 2488, 2495–96 (2004) (stating that ERISA can convert a claim pleaded in terms of state law into a federal law claim when ERISA “wholly displaces the state-law cause of action through complete pre-emption”), quoting *Beneficial National Bank v Anderson*, 539 US 1, 8 (2003); 29 USC § 1132(a) (delineating those entities authorized to bring a civil action).

<sup>8</sup> See 29 USC § 1132(a)(3) (stating that the action may be brought to obtain an injunction or “other appropriate equitable relief”); *Knudson*, 534 US at 214, 221 (interpreting “equitable relief” to exclude actions for reimbursement of an ERISA plan where money or property identified as belonging to the plaintiff could not clearly be traced to particular funds or property in the defendant's possession). See also *Mertens v Hewitt Associates*, 508 US 248, 254 (1993) (stating that ERISA's “carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly”) (internal quotation marks omitted). The Court held that equitable relief could include that typically available in equity, such as injunction, mandamus, and restitution, but not claims for compensatory damages. See id at 256.

<sup>9</sup> In *McDowell*, the Ninth Circuit ruled that a state law breach of contract claim was not preempted because it was merely a claim for reimbursement based upon a third-party settlement and did not relate to an ERISA plan. 385 F3d at 1172–73 (noting that the plaintiff's claim “does not fall within ERISA's civil enforcement provision”).

the mid-1990s and would promote a public policy that supports the purposes underlying ERISA.

Part I traces the legislative history of ERISA and addresses the purposes of the statute most relevant to this discussion. Part II describes in greater detail the query posed by the foregoing hypothetical and follows the two governing lines of jurisprudence from their inception to the present. Part III argues that ERISA plan fiduciaries ought to be able to bring state law breach of contract claims for reimbursement against plan beneficiaries.

## I. THE HISTORY AND PURPOSE OF ERISA

### A. Pre-ERISA Legislation

Congress first addressed employee benefit plans in 1921 by providing tax deductions for employers who contributed to employee pension plans.<sup>10</sup> Subsequent legislation further encouraged companies to establish retirement programs for employees by providing for tax-exempt trusts and shielding employees from income taxation on contributions made by employers on their behalf.<sup>11</sup>

As Congress expanded the federal role in regulating retirement and welfare plans, the states enacted their own legislation in an attempt to increase control over the plans.<sup>12</sup> Congress granted ERISA considerable preemptive power to avoid problems for multistate employers resulting from differing rules of liability across jurisdictions. Congress aimed to make the voluntary provision of fringe benefits more attractive to multistate employers via strong preemption of state regulations; the resulting uniformity in the legal regime would reduce the administrative costs to employers of offering employee benefits plans.<sup>13</sup>

### B. Enactment and Purpose

President Ford signed ERISA into law on September 2, 1974.<sup>14</sup> Congress intended the Act to guarantee the solvency and integrity of

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<sup>10</sup> See Revenue Act of 1921 § 219(f), Pub L No 67-98, 42 Stat 227, 247 (stating that contributions to qualified plans created by employers “shall not be taxable”).

<sup>11</sup> See Revenue Act of 1926 § 219(f), Pub L No 69-20, 44 Stat 9, 33-34; Revenue Act of 1928 § 165, Pub L No 70-562, 45 Stat 791, 839.

<sup>12</sup> See Steven J. Sacher, et al, eds, *Employee Benefits Law* 5 (BNA 1991).

<sup>13</sup> See Russell Korobkin, *The Failed Jurisprudence of Managed Care, and How to Fix It: Reinterpreting ERISA Preemption*, 51 UCLA L Rev 457, 465-66 (2003).

<sup>14</sup> See Michael G. Kushner and Janet K. Song, eds, *ERISA: The Law and The Code* v (BNA 2001). The Act was the culmination of efforts begun over a decade earlier when, in 1963, President Kennedy initiated an ambitious study of employee benefit regulation. See Sacher, et al, eds, *Employee Benefits Law* at 6 (cited in note 12).

employer-sponsored private pension plans in order to protect employees through a uniform federal administrative scheme.<sup>15</sup> In the conference committee responsible for reconciling the Senate and House versions of the bill, ERISA's scope was expanded to provide for federal oversight of all employer-sponsored fringe benefit plans, including medical plans.<sup>16</sup>

ERISA is intended to promote the interests of plan beneficiaries in employee benefit plans by improving the plans' "equitable character and soundness."<sup>17</sup> Since 1974, Congress has experimented extensively with medical and other employee benefits, but ERISA's structure and purpose remain unchanged.

ERISA's standards of conduct are meant to be national, allowing for uniform enforcement and consistent application.<sup>18</sup> Congress's intent to federalize employer sponsored benefits law appears in two sections of the statute: § 514,<sup>19</sup> which outlines ERISA's preemptive effect upon state laws; and § 502(a),<sup>20</sup> the civil enforcement and remedy provision. The preemption provision states that, with a few enumerated exceptions not relevant to this Comment, ERISA's regulations "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."<sup>21</sup> Both "State" and "State law" are broadly defined for purposes of the preemption provision.<sup>22</sup>

The civil enforcement and remedy provision details the conditions under which entities and individuals affected by ERISA (including states, "participants" in the plans, "beneficiaries," and "fiduciaries") may bring civil suits.<sup>23</sup> The section defines jurisdiction as exclusively federal (with two minor exceptions not relevant to this Comment),<sup>24</sup> grants federal jurisdiction regardless of the amount in controversy or the citizenship of the parties,<sup>25</sup> and limits the types of suits that may be brought.<sup>26</sup> Section 502(a)(3) allows plan fiduciaries to ob-

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<sup>15</sup> See Korobkin, 51 UCLA L Rev at 464–65 (cited in note 13).

<sup>16</sup> See id at 465.

<sup>17</sup> See 29 USC § 1001(c); *Shaw v Delta Air Lines, Inc*, 463 US 85, 90 (1983) (stating that ERISA is "designed to promote the interests of employees and their beneficiaries").

<sup>18</sup> The Supreme Court has stated that "[t]he purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc v Davila*, 542 US 200, 124 S Ct 2488, 2495 (2004).

<sup>19</sup> 29 USC § 1144(a).

<sup>20</sup> Id § 1132(a).

<sup>21</sup> Id § 1144(a).

<sup>22</sup> See id § 1144(c)(1)–(2).

<sup>23</sup> Id § 1132(a).

<sup>24</sup> Id § 1132(e).

<sup>25</sup> Id § 1132(f).

<sup>26</sup> Id § 1132(a).

tain “appropriate equitable relief” to redress certain ERISA violations and enforce the terms of the benefits plan at issue.<sup>27</sup> The interaction between the Supreme Court’s expanding interpretation of ERISA’s preemption provision and its narrowing interpretation of “equitable relief” in the civil enforcement provision frames the question that this Comment addresses.

## II. THE CURRENT QUANDARY

The following discussion examines two lines of cases: one dealing with ERISA preemption of state law and the other considering the meaning of “equitable relief” in the civil remedies provision. Part II.A reviews the development of ERISA’s broad preemption jurisprudence and offers a synthesis and explanation of the relevant cases. Part II.B discusses the Supreme Court’s treatment of ERISA’s civil enforcement provision and the narrowing interpretation of “equitable relief” in that provision. Part II.C concludes by illustrating how, in the absence of a state law alternative, these two strands of jurisprudence converge to leave ERISA fiduciaries without remedy when beneficiaries party to reimbursement agreements double collect.

### A. ERISA Preemption of State Law

Until 1995 the Supreme Court’s interpretation of ERISA’s preemption provision was consistently both actually and nominally broad.<sup>28</sup> The Court altered its ERISA preemption analysis in 1995 in an effort to ensure that there was a limit to the scope of ERISA’s preemptive force.<sup>29</sup> Even so, the Court continues to interpret ERISA’s preemption section broadly, giving the statute far-reaching preemptive force.<sup>30</sup>

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<sup>27</sup> *Id.* § 1132(a)(3).

<sup>28</sup> See Meridith H. Bogart, Note, *State Doctrines of Substantial Compliance: A Call for ERISA Preemption and Uniform Federal Common Law Doctrine*, 25 *Cardozo L. Rev.* 447, 458–59 (2003) (“The Court’s initial approach to ERISA preemption during the 1980s and early 1990s was a broad interpretation of the ‘relate to’ clause. . . . [The clause was] literally and strictly interpreted.”).

<sup>29</sup> See *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Insurance Co.*, 514 US 645, 655 (1995) (“[O]ne might be excused for wondering, at first blush, whether [the preemption provision’s] words of limitation . . . do much limiting. . . . [W]e have to recognize that our prior attempt to construe the phrase ‘relate to’ does not give us much help drawing the line here.”).

<sup>30</sup> See *Aetna Health Inc v Davila*, 542 US 200, 124 S. Ct. 2488, 2495 (2004) (“[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.”). ERISA’s preemption provision itself provides in relevant part: “[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” 29 USC § 1144(a).

# 1. Early ERISA preemption cases: strong presumption of preemption.

In the early line of ERISA preemption cases, the Supreme Court adhered to a broad understanding of ERISA preemption, leading almost automatically to preemption of the state law at issue. In *Shaw v Delta Air Lines, Inc.*,<sup>31</sup> the first major case to deal with this issue, the Court articulated a broad standard for ERISA preemption:

The breadth of § 514(a)'s pre-emptive reach is apparent from that section's language. A law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. . . . We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.<sup>32</sup>

The Court's reference to Congress's intent is rooted in its approach to preemption generally.<sup>33</sup> The combination of § 514(a)'s broad language and Congress's intent to federalize employee benefits through ERISA made the outcome of the "relates to" inquiry in *Shaw* seem virtually self-evident to the Court.<sup>34</sup>

Throughout the next decade, the Supreme Court regularly relied upon the reasoning in *Shaw* when dealing with ERISA preemption cases,<sup>35</sup> using it to develop at least one lasting concrete rule: ERISA

<sup>31</sup> 463 US 85 (1983) (holding that ERISA preempted a state human rights law, but that it did not preempt the disability benefits law at issue).

<sup>32</sup> *Id.* at 96–97.

<sup>33</sup> See *id.* at 95 ("In deciding whether a federal law pre-empts a state statute, [a court's] task is to ascertain Congress' intent in enacting the federal statute at issue. Pre-emption . . . is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.") (internal quotation marks omitted).

<sup>34</sup> See *id.* at 98 (stating that "Congress used the words 'relate to' in § 514(a) in their broad sense" and that "given the legislative history, [ ] § 514(a) [cannot] be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like").

<sup>35</sup> See, for example, *Metropolitan Life Insurance Co v Massachusetts*, 471 US 724, 739 (1985) (citing *Shaw* for the proposition that "[t]he pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements," because "a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan'"). Not all of these cases, however, resulted in preemption of the state law. In *Metropolitan Life Insurance* itself, for example, the statute at issue was saved from ERISA § 514(a) preemption by a special exception found in § 514(b). See *id.* at 744. In *Mackey v Lanier Collection Agency & Service, Inc.*, 486 US 825 (1988), the Court invalidated a portion of a statute on the basis of § 514(a) preemption. *Id.* at 830 ("The state statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach."). The Court let another portion stand, however, on the basis of congressional intent. *Id.* at 840–41. The Court seemed persuaded, at least in part, by the near unified support of this position by other courts that had considered the question. See *id.* at 832, 840 ("This inquiry supports our reading of § 514(a), which is the reading given it by every other court

preempts any state law which explicitly refers to or is premised upon the existence of an ERISA-regulated benefit plan. In *Ingersoll-Rand Co v McClendon*,<sup>36</sup> for example, the Court held that ERISA preempted the common law claim because the claim was “premiered on [ ] the existence of a pension plan.”<sup>37</sup>

2. The modern line of ERISA preemption cases:  
1995 to the present.

In 1995 the Court unanimously decided *New York State Conference of Blue Cross & Blue Shield Plans v Travelers Insurance Co*,<sup>38</sup> altering, at least nominally, its approach to ERISA preemption.<sup>39</sup> In *Travelers*, the Court determined that § 514 did not preempt a New York statute imposing surcharges on hospitals' health maintenance organizations.<sup>40</sup> Looking first to the text of § 514(a), the Court noted that “one might be excused for wondering, at first blush, whether the words of limitation (‘insofar as they . . . relate’) do much limiting. If ‘relate to’ were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course.”<sup>41</sup> The Court acknowledged that its own “prior attempt to construe the phrase ‘relate to’ does not give [ ] much help drawing the line here,” and looked “instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.”<sup>42</sup> After some discussion of ERISA's purposes and Congress's intent, the Court concluded that the purpose and effects of the New York surcharge distinguished it from laws preempted by ERISA and allowed the surcharge to stand.<sup>43</sup>

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that has considered the issue in this context (save the Ninth Circuit in a decision that was vacated by this Court).”).

<sup>36</sup> 498 US 133 (1990).

<sup>37</sup> *Id.* at 140. See also *District of Columbia v Greater Washington Board of Trade*, 506 US 125, 129–30 (1992) (“Under § 514(a), ERISA pre-empts any state law that refers to or has a connection with covered benefit plans . . . ‘even if the law is not specifically designed to affect such plans, or the effect is only indirect.’”), quoting *McClendon*, 498 US at 139.

<sup>38</sup> 514 US 645 (1995).

<sup>39</sup> See *id.* at 655.

<sup>40</sup> *Id.* at 649 (“We hold that the provisions for surcharges do not ‘relate to’ employee benefit plans within the meaning of ERISA's pre-emption provision and accordingly suffer no pre-emption.”) (internal citation omitted).

<sup>41</sup> *Id.* at 655. This course was hinted at as early as *Shaw*, but not emphasized until *Travelers*. See *Shaw*, 463 US at 100 n 21, citing with approval *American Telephone and Telegraph Co v Merry*, 592 F2d 118, 121 (2d Cir 1979) (“[S]trict, literal construction [ ] would necessarily lead to the unreasonable conclusion that Congress intended to preempt even those state laws that only in the most remote and peripheral manner touch upon pension plans.”).

<sup>42</sup> *Travelers*, 514 US at 655–56.

<sup>43</sup> *Id.* at 658–62.

Although *Travelers* represented a shift away from the previous line of cases and the “infinite connections” understanding of ERISA’s preemption provision that those cases represent, the Court since *Travelers* has continued to apply § 514(a) broadly. For example, in *Egelhoff v Egelhoff*,<sup>44</sup> the Court held that ERISA preempted, to the extent it applied to ERISA plans, a Washington state statute providing that the designation of a spouse as an insurance beneficiary is revoked upon divorce.<sup>45</sup> Though the Court found the law preempted, it admonished the petitioner for focusing on the broad language in *Shaw*<sup>46</sup> and reiterated its holding in *Travelers* that the preemption inquiry should focus on ERISA’s objectives.<sup>47</sup> The Court emphasized that a conclusion regarding preemption would depend upon “the nature of the effect of the state law on ERISA plans.”<sup>48</sup> The Washington statute was preempted because it would affect an ERISA plan’s system for processing claims and paying benefits; because the law affected only Washington state, it “directly conflict[ed]” with ERISA’s purpose of uniformity.<sup>49</sup>

The Court’s approach to preemption remains especially broad with regard to ERISA’s civil remedy provision. Most recently, in *Aetna Health Inc v Davila*,<sup>50</sup> the Court held that “any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted.”<sup>51</sup> A state law claim is preempted if it is (1) one for which ERISA provides a cause of action and (2) one which does not arise independently of plan terms.<sup>52</sup> The Court was particularly concerned with plaintiffs re-

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<sup>44</sup> 532 US 141 (2001).

<sup>45</sup> Id at 149–50.

<sup>46</sup> Id at 147, citing *Shaw*, 463 US at 97.

<sup>47</sup> *Egelhoff*, 532 US at 147, quoting *Travelers*, 514 US at 656.

<sup>48</sup> *Egelhoff*, 532 US at 147, quoting *California Division of Labor Standards Enforcement v Dillingham Construction, NA, Inc.*, 519 US 316, 325 (1997).

<sup>49</sup> *Egelhoff*, 532 US at 150. The Court also noted that “[t]he Washington statute also has a prohibited connection with ERISA plans because it interferes with nationally uniform plan administration.” Id at 148. Compare this holding with the Court’s response to an argument that a preemption ruling would indicate that ERISA preempted “various state statutes providing that a murdering heir is not entitled to receive property as a result of the killing” because the “slayer” statutes could revoke the beneficiary status of someone who murdered a plan participant.” Id at 152. Without ruling on the matter, the Court implied that the slayer statutes’ “long historical pedigree predating ERISA” would be a factor in the preemption analysis. Id. Furthermore, the Court suggested that because nearly every state had such a statute in place, they might not interfere with Congress’s intent to create uniformity in employee benefit plan administration and regulation through ERISA. Id. By implication, more or less uniform contract laws nationwide should not interfere with ERISA’s purpose of uniformity.

<sup>50</sup> 542 US 200, 124 S Ct 2488 (2004).

<sup>51</sup> Id at 2495.

<sup>52</sup> See id at 2496 (“[I]f an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is impli-



characterizing their state law causes of action in order to avoid ERISA preemption; the Court explained, “distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would elevate form over substance and allow parties to evade the pre-emptive scope of ERISA simply by relabeling their [ ] claims.”<sup>53</sup>

### 3. ERISA preemption: a unifying theme.

The Supreme Court’s approach to ERISA preemption is not encapsulated in any of its individual holdings (*Davila* included)<sup>54</sup> but must be ascertained by examining the relevant cases to discover a unifying theme. Such an examination reveals that the Court will strike down as preempted state law causes of action which significantly impact the calculation or administration of benefits under ERISA plans.<sup>55</sup> For example, in *Egelhoff* the Court held that ERISA preempted a Washington statute which limited the ability of ERISA plans to determine who should be deemed a beneficiary.<sup>56</sup> The Court noted that, “unlike generally applicable laws regulating areas where ERISA has nothing to say, which we have upheld notwithstanding their incidental effect on ERISA plans, this statute governs the payment of

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cated by a defendant’s actions, then the individual’s cause of action is completely pre-empted by ERISA § 502(a)(1)(B).”).

<sup>53</sup> Id at 2498 (internal quotation marks omitted). Note that, in *Davila*, the Court dealt specifically with a party attempting to recast a breach of contract claim as an equitable action.

<sup>54</sup> In the twenty years since *Shaw*, the Supreme Court has decided about as many cases pertaining to ERISA preemption of state laws. In the presence of a clearly articulated guideline for the lower courts that adequately expressed the Court’s intentions, it is unlikely that so many decisions would have been necessary. See Bogart, Note, 25 Cardozo L Rev at 463–64 (cited in note 28) (noting that though “[t]he Court moved further away from the liberal ‘relate to’ test in its ERISA preemption decisions following *Travelers* . . . subsequent cases did not strictly adhere to the reasoning in *Travelers* and provided other reasons for following a restrictive preemption approach”).

<sup>55</sup> “Calculation” and “administration” as used here refer to the determination of the appropriate amount of benefits to award to plan beneficiaries and who those beneficiaries will be. This reduction of the Court’s ERISA preemption jurisprudence does not account for cases that do not involve state laws that explicitly mention or are premised upon the existence of ERISA plans. The laws in such cases are preempted as a matter of course. See text accompanying notes 35–37. See also *Mackey*, 486 US at 830 (holding that ERISA preempted a state law “which single[d] out ERISA employee welfare benefit plans for different treatment under state garnishment procedures”). In *Mackey*, the Court admitted that it has “virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are pre-empted” by ERISA. Id at 829 (internal quotation marks omitted). The Court has indicated a willingness to continue with this approach even after *Travelers*. See, for example, *DeBuono v NYSA-ILA Medical and Clinical Services Fund*, 520 US 806, 814–15 (1997) (“This is not a case . . . in which the existence of a [benefit] plan is a critical element of a state-law cause of action, or one in which the state statute contains provisions that expressly refer to ERISA or ERISA plans.”).

<sup>56</sup> 532 US at 147.

benefits, a central matter of plan administration.”<sup>57</sup> Similarly, in *Alessi v Raybestos-Manhattan, Inc.*,<sup>58</sup> the Court again found preemption, noting that the statute in question “relate[d] to pension plans governed by ERISA because it eliminate[d] one method for calculating pension benefits—integration—that is permitted by federal law.”<sup>59</sup>

By contrast, in cases in which the Court did not find the state law in question preempted by ERISA, the Court frequently pointed out that the law did not interfere with the calculation or administration of benefits. In *DeBuono v NYSA-ILA Medical and Clinical Services Fund*,<sup>60</sup> for example, the Court held that ERISA did not preempt a state tax in part because the state did not forbid a method of calculating pension benefits.<sup>61</sup> In the same term Justice Thomas, author of the *Davila* opinion, wrote for the majority in *California Division of Labor Standards Enforcement v Dillingham Construction, NA, Inc.*,<sup>62</sup> holding that ERISA did not preempt certain state wage laws and apprenticeship standards.<sup>63</sup> The Court explained that “[t]he prevailing wage statute altere[d] the incentives, but [did] not dictate the choices, facing ERISA plans.”<sup>64</sup> And of course, *Travelers* itself reached its conclusion that ERISA did not preempt state surcharges assessed against medical patients in part because the surcharges did not bind plan administrators to any particular choice regarding plan administration, but simply affected the costs of benefits and the relative costs of competing insurance to provide them.<sup>65</sup> These cases clearly establish a pattern illustrative of the consideration truly decisive to the Court in deciding whether ERISA preempts a state law cause of action—the impact of the state law upon the calculation or administration of ERISA plan benefits.

*Davila*’s holding is consistent with this pattern. *Davila* involved two consolidated cases with similar facts. In each case, the plan beneficiary alleged that the ERISA plan insurer did not adequately administer the beneficiary’s employee benefit plan, denying payment for a drug in one instance and for a hospital stay in the other.<sup>66</sup> The nature

<sup>57</sup> Id at 147–48 (internal quotation marks and citations omitted).

<sup>58</sup> 451 US 504 (1981).

<sup>59</sup> Id at 524 (internal quotation marks omitted).

<sup>60</sup> 520 US 806 (1997).

<sup>61</sup> Id at 814–15 (holding that the statute at issue was one of general applicability that does not “relate to” benefit plans under the ERISA preemption provision).

<sup>62</sup> 519 US 316 (1997).

<sup>63</sup> Id at 334.

<sup>64</sup> Id.

<sup>65</sup> See 514 US at 659–60 (explaining that “[a]n indirect economic influence” on the choices made by insurance buyers, including ERISA plans, “does not bind administrators to any particular choice” and so does not “function as a regulation of an ERISA plan”).

<sup>66</sup> See *Davila*, 124 S Ct at 2496–97.

of the two complaints led the Court to determine that the beneficiaries “complain only about denials of coverage promised under the terms of ERISA-regulated employee benefit plans.”<sup>67</sup>

Ostensibly operating under the *Davila* framework, the Ninth Circuit recently determined that an ERISA fiduciary’s state law breach of contract action against a double-collecting beneficiary was not preempted by ERISA. In *Providence Health Plan v McDowell*,<sup>68</sup> the court held that the breach of contract action was not preempted because it did not have an appropriate “connection with” an employee benefit plan, and did not fall within the scope of ERISA’s civil enforcement provision.<sup>69</sup> The court described the factors influencing its holding:

[The ERISA plan insurer] is simply attempting, through contract law, to enforce the reimbursement provision. Adjudication of its claim does not require interpreting the plan or dictate any sort of distribution of benefits. [The ERISA plan insurer] has already paid ERISA benefits on behalf of the [beneficiaries], and they are not disputing the correctness of the benefits paid. . . . Because this is merely a claim for reimbursement based upon the third-party settlement, it does not “relate to” the plan.<sup>70</sup>

This rationale is consistent with the unifying theme of the Supreme Court’s ERISA preemption cases as articulated in the preceding paragraph: ERISA will only preempt state laws and causes of action that substantially affect the determination and administration of benefits.

#### B. “Equitable Relief”: ERISA’s Civil Enforcement Remedy Provision

The Supreme Court made clear in 2002’s *Great-West Life & Annuity Insurance Co v Knudson*<sup>71</sup> that its interpretation of “equitable relief” under § 502(a)(3) is quite narrow, limiting the remedies avail-

<sup>67</sup> Id at 2497.

<sup>68</sup> 385 F3d 1168 (9th Cir 2004), cert denied, 125 S Ct 1726 (2005) and 125 S Ct 1735 (2005).

<sup>69</sup> 385 F3d at 1172.

<sup>70</sup> Id, citing *Blue Cross of California v Anesthesia Care Associates Medical Group, Inc*, 187 F3d 1045, 1053–54 (9th Cir 1999). Note that the majority opinion does not cite *Davila* at all, and the dissent does so in only the most cursory fashion. See *McDowell*, 385 F3d at 1176 (Thomas dissenting from the denial of rehearing en banc) (“[The majority’s holding] cannot be reconciled with our precedent, nor with the Supreme Court’s ERISA decisions. Indeed, the Supreme Court’s recent decision in *Aetna Health Inc. v. Davila* further bolsters the opposite conclusion.”) (internal citation omitted). This treatment indicates that the Ninth Circuit views *Davila* as merely supplementing rather than replacing earlier Supreme Court ERISA preemption jurisprudence.

<sup>71</sup> 534 US 204 (2002).

able to only those typically available at equity.<sup>72</sup> ERISA § 502(a)(3) allows a civil action to be brought

by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.<sup>73</sup>

The following discussion highlights the Supreme Court's interpretation of § 502(a)(3), beginning with the decision of *Massachusetts Mutual Life Insurance Co v Russell*<sup>74</sup> in 1985.

The Court's current interpretation of ERISA's civil remedy provision reflects the tack chosen in *Russell*.<sup>75</sup> In *Russell*, the Supreme Court held that the only remedies available for violation of ERISA are those that the statute itself authorizes.<sup>76</sup> *Russell* involved an ERISA plan beneficiary who was paid all the benefits to which she was contractually entitled. The beneficiary nevertheless sued her plan fiduciary, pleading various state law and ERISA-based causes of action involving the plan administrators' alleged delay in processing her disputed claim.<sup>77</sup> The plaintiff argued that ERISA contained an implied right of action for "extracontractual" damages.<sup>78</sup> After examining the statute's legislative history, the Court concluded that "Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."<sup>79</sup>

Eight years after *Russell*, the Court decided *Mertens v Hewitt Associates*,<sup>80</sup> in which the petitioners sought money damages under

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<sup>72</sup> Id at 214–15 (holding that § 502(a)(3) tracks "fine distinction[s]" between at-law and equitable relief when such distinctions are relevant). See also Roger M. Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L Rev 595, 598 (2004) (noting that the *Knudson* majority construed § 502(a)(3) narrowly in light of the statutory language).

<sup>73</sup> 29 USC § 1132(a)(3).

<sup>74</sup> 473 US 134 (1985).

<sup>75</sup> See John H. Langbein, *What ERISA Means by Equitable: The Supreme Court's Trial of Error in Russell, Mertens, and Great-West*, 103 Colum L Rev 1317, 1338 (2003) ("The Supreme Court's engagement with ERISA remedy law got off to a bad start in 1985 on account of unwise dicta in [*Russell*].").

<sup>76</sup> See *Russell*, 473 US at 146. See also Langbein, 103 Colum L Rev at 1342–43 (cited in note 75) (discussing dicta in *Russell* expressing "concern to avoid implying a cause of action . . . that Congress may have deliberately omitted").

<sup>77</sup> *Russell*, 473 US at 136–37.

<sup>78</sup> Id at 145 (reporting that the respondent argued that an implied right should be found under the test of *Cort v Ash*), citing *Cort v Ash*, 422 US 66, 78 (1975) (listing several factors for determining an implicit right in a statute).

<sup>79</sup> *Russell*, 473 US at 146.

<sup>80</sup> 508 US 248 (1993).

§ 502(a)(3).<sup>81</sup> Justice Scalia, writing for the majority, stressed that “[m]oney damages are, of course, the classic form of *legal* relief” and found that the petitioners sought compensatory damages rather than the equitable relief afforded by § 502(a)(3).<sup>82</sup> Remedies under § 502(a)(3) were and are limited to those typically available at equity.<sup>83</sup> In a last-ditch effort to salvage the case, the petitioner contended that the Court’s interpretation would leave beneficiaries less protected than before ERISA’s enactment: state law causes of action formerly available to them would now be preempted, contradicting ERISA’s basic goal of protecting employees and their dependents.<sup>84</sup> The Court rejected the argument, holding that the text was dispositive.<sup>85</sup>

In *Knudson* the Court reiterated that “equitable relief” in ERISA § 502(a)(3) referred only to those remedies “typically available at equity.”<sup>86</sup> The case involved a reimbursement provision requiring plan beneficiaries to give to the plan fiduciary any sum recovered from a third party for the beneficiary’s injuries, up to the amount paid to the beneficiary by the fiduciary.<sup>87</sup> The respondent, Knudson, was rendered quadriplegic by a car accident, and the petitioner, Great-West, an ERISA fiduciary, paid her benefits.<sup>88</sup> Knudson forced a settlement

<sup>81</sup> Id at 251 (“Petitioners sought certiorari only on the question whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary’s breach of fiduciary duty.”).

<sup>82</sup> Id at 255. The Court acknowledged, however, that monetary relief was sometimes granted in equity courts, which at common law had the power to establish purely legal rights and grant legal remedies. See id at 256. Therefore, the Court reasoned, “equitable relief” could mean “whatever relief a court of equity is empowered to provide in the particular case at issue” (which, as ERISA creates trust relations, would include equitable *and* legal remedies in ERISA cases), or simply “those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages).” Id. The Court concluded that as equity courts could grant “*all* relief available” in trust cases, the former reading would make the modifier “equitable” superfluous and thus the Court chose the latter. Id at 257–58. This interpretation definitively prevents ERISA plan fiduciaries from bringing at-law reimbursement claims such as breach of contract or restitution under ERISA itself, since those claims would not yield the types of remedies “typically” available at equity.

<sup>83</sup> Id at 256.

<sup>84</sup> Id at 261.

<sup>85</sup> Id (“[V]ague notions of a statute’s ‘basic purpose’ are [ ] inadequate to overcome the words of its text regarding the *specific* issue under consideration.”). Though in *Mertens* the Court had no problems leaving the beneficiary without remedy, it did so in the face of text it considered clear. By contrast, the “relates to” language in ERISA’s preemption provision is, by the Court’s own concession, in need of interpretation. See *Travelers*, 514 US at 658 (using ERISA’s purpose as a guide to determine preemption in the face of indeterminate text).

<sup>86</sup> *Knudson*, 534 US at 211.

<sup>87</sup> Id at 207 (“Specifically, the Plan has ‘a first lien upon any recovery . . .’ that the beneficiary receives from the third party.”). The plan’s terms of agreement provided for personal liability in the event the beneficiary recovered from a third party and failed to reimburse the fiduciary. See id.

<sup>88</sup> Id.

with a third party exceeding the benefits paid, and Great-West subsequently sued in federal court under ERISA § 502(a)(3) to collect an amount equal to the benefits.<sup>89</sup>

Great-West made two principal arguments. First, Great-West argued that it sought only an injunction to compel the payment of the money owed.<sup>90</sup> The Court relied on *Mertens* to conclude that Great-West could not advance this theory under § 502(a)(3)(A) or (B) because the remedies sought (an injunction to compel the payment of money contractually owed and specific performance of a contract to pay money) were not typically available at equity.<sup>91</sup>

Second, Great-West argued that its suit delineated an equitable claim for restitution and was therefore authorized by § 502(a)(3)(B).<sup>92</sup> This approach, the Court said, was only nominally consistent with *Mertens*. Restitution claims can be legal as well as equitable; the nature of a given claim depends on the claim's basis and the nature of the remedies sought. Ultimately the Court in *Knudson* determined that Great-West did not seek equitable restitution.<sup>93</sup> Equitable restitution would return particular funds or property in Knudson's possession to Great-West. Legal restitution would not seek particular funds or property but would allow any funds available to satisfy a debt for which Knudson was personally liable.<sup>94</sup> Because Great-West did not seek the return of particular funds but merely the payment of "some" funds to which it was entitled for benefits conferred, Great-West sought a legal remedy.<sup>95</sup> Section 502(a)(3) allows only for equitable relief and therefore did not authorize Great-West's action.<sup>96</sup>

### C. The Intersection of ERISA Preemption and Civil Remedies: A "Regulatory Vacuum"?

Considered individually, the above developments in ERISA's preemption and civil remedies jurisprudence may not seem worri-

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<sup>89</sup> Id at 208.

<sup>90</sup> Id at 210 (reporting that Great-West claimed to "seek 'to enjoin an act or practice'—respondent's failure to reimburse the plan").

<sup>91</sup> See id at 211. In a footnote the Court stated that the injunction referred to in § 502(a)(3)(A) must be equitable in nature because § 502(a)(3)(B) refers to "other" equitable relief. *Knudson*, 534 US at 211 n 1. Further, the Court held that injunctions are inherently equitable; without such a limitation on the scope of injunctive relief, the limitation of remedy to injunction would be meaningless, "since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." Id.

<sup>92</sup> Id at 212.

<sup>93</sup> See id at 214 (concluding that Great-West did not seek a constructive trust or equitable lien, but to impose "personal liability for the benefits that they conferred").

<sup>94</sup> See id.

<sup>95</sup> See id.

<sup>96</sup> See id at 221.

some, or even remarkable. Operating in conjunction, however, they may foreclose the possibility of relief for ERISA fiduciaries injured by double-collecting beneficiaries who refuse to reimburse per their contractual obligations.<sup>97</sup> In her concurrence in *Davila*, Justice Ginsburg expressed concern that the Court's ERISA preemption and civil remedies jurisprudence together create a "regulatory vacuum" in which "[v]irtually all state law remedies are preempted but very few federal substitutes are provided."<sup>98</sup> Justice Ginsburg's concern seems particularly well founded in light of the difficulty of properly constructing a claim for equitable relief under *Knudson*.

Several courts of appeals have considered which types of reimbursement remedies constitute "equitable relief" under the *Knudson* standard.<sup>99</sup> These cases have followed *Knudson*'s approach, severely limiting the types of remedies available to fiduciaries in reimbursement actions against double-collecting beneficiaries. Three approaches exist: treating all reimbursement claims as legal; treating recovery as equitable only when a fiduciary can identify the particular funds paid by the fiduciary to the beneficiary in compensation for a given injury; and treating recovery as equitable whenever a fiduciary can identify funds paid to the beneficiary by either the fiduciary itself or some third party in compensation for the same injury. All three approaches make recovery by fiduciaries under ERISA quite difficult.

The Ninth Circuit has taken the first approach, denying recovery in federal court to all fiduciaries seeking reimbursement. In *Westaff (USA) Inc v Arce*,<sup>100</sup> the court focused on language in *Mertens* and *Knudson* instructing courts to "look[] past the parties' chosen labels to the substance of the relief sought," which in that case, the court determined, was compensation for a breach of contract.<sup>101</sup> The court ex-

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<sup>97</sup> See *Davila*, 124 S Ct at 2503 (Ginsburg concurring).

<sup>98</sup> *Id* (internal quotation marks omitted).

<sup>99</sup> See, for example, *Qualchoice, Inc v Rowland*, 367 F3d 638, 643–49 (6th Cir 2004) (describing *Knudson* and numerous cases applying it, before concluding that an action to force performance of a contract to pay money does not seek equitable relief), cert denied, 125 S Ct 1639 (2005); *Bombardier Aerospace Employee Welfare Benefits Plan v Ferrer, Poirot and Wansbrough*, 354 F3d 348, 355–57 (5th Cir 2003) (distinguishing *Knudson* on the facts where the defendant had "ultimate control over, and thus constructive possession of, the disputed funds"), cert denied, 124 S Ct 2412 (2004); *Administrative Committee of the Wal-Mart Stores, Inc Associates' Health and Welfare Plan v Varco*, 338 F3d 680, 686–88 (7th Cir 2003) (distinguishing *Knudson* where the funds were "held in [the defendant's] reserve bank account"), cert denied, 124 S Ct 2904 (2004); *Westaff (USA) Inc v Arce*, 298 F3d 1164, 1166–67 (9th Cir 2002) (describing *Knudson* and concluding that plaintiffs sought legal "money damages" where the money sought was specifically identifiable and held in an escrow account), cert denied, 537 US 1111 (2003).

<sup>100</sup> 298 F3d 1164 (9th Cir 2002).

<sup>101</sup> *Id* at 1166 ("Westaff is seeking to enforce a contractual obligation for the payment of money, a classic action at law and not an equitable claim.").

PLICITLY denied that this determination turned on whether particular funds could be identified.<sup>102</sup>

The paradigm case for the opposite approach is *Bombardier Aerospace Employee Welfare Benefits Plan v Ferrer, Poirot and Wansbrough*.<sup>103</sup> The Fifth Circuit outlined a three-prong test for determining whether a fiduciary seeks equitable relief, holding that a reimbursement action is equitable if it seeks to recover funds that (1) are specifically identifiable, (2) belong in good conscience to the benefit plan, and (3) are within the possession and control of the beneficiary.<sup>104</sup>

No court of appeals has yet adopted the intermediate approach,<sup>105</sup> but the Sixth Circuit has left the possibility open. In *Qualchoice, Inc v Rowland*,<sup>106</sup> the court held that a fiduciary's reimbursement action is legal when the ERISA beneficiary recovers from a third party and possesses that recovery in an identifiable fund.<sup>107</sup> The case, however, does not determine whether the action would be legal if the beneficiary maintained an identifiable fund containing money paid to the beneficiary by the fiduciary. In *Community Health Plan of Ohio v Mosser*<sup>108</sup> (relied upon by the court in *Rowland*), however, the court suggests in dicta that in order to recover the plaintiff must be able to identify money that it has given to the defendant and wants returned.<sup>109</sup>

<sup>102</sup> See *id.* at 1167 ("This case differs from our prior cases [denying at-law remedies under ERISA] only in that the money at issue, a legitimate personal injury settlement to which the beneficiary is entitled, has been placed in an escrow account and remains specifically identifiable. The action remains one for money damages.").

<sup>103</sup> 354 F3d 348 (5th Cir 2003).

<sup>104</sup> See *id.* at 356. For support, the court cited the Seventh Circuit's decision in *Varco*, which pursued a nearly identical analytic path. *Id.* at 357 & n 40, citing *Varco*, 338 F3d at 687–88. *Varco* holds that "the reimbursement action . . . in this unique case is equitable because the funds the [fiduciary] seeks to recover are identifiable, are in the control of [the beneficiary], and the [fiduciary] is right-fully entitled to the monies under the terms of the Plan." 338 F3d at 688.

<sup>105</sup> The Third and Fourth Circuits have each considered the reimbursement issue generally, "but have done so only in unpublished opinions involving obscure factual scenarios." See *Rowland*, 367 F3d at 647, citing *Sackman v Teaneck Nursing Center*, 2003 US App LEXIS 26668, \*5–7 (3d Cir) (relying upon *Knudson* to deny reimbursement because the ERISA fiduciary sought to impose a form of personal liability upon the beneficiary); *Local 109 Retirement Fund v First Union National Bank*, 2003 US App LEXIS 1066, \*5 (4th Cir) (holding that a bank's "agreement in a certificate of deposit or other instrument to repay a specified amount of money (plus interest) is quintessentially a legal agreement" and finding no equitable claim).

<sup>106</sup> 367 F3d 638 (6th Cir 2004).

<sup>107</sup> *Id.* at 650. The court in *Rowland* had a secondary justification for its decision: in previous cases the Sixth Circuit decided that subrogation is not available when a beneficiary has already recovered from the third party, but rather is only available in cases in which the fiduciary steps into the shoes of the beneficiary to assert the beneficiary's rights against another. *Id.* at 649–50. Subrogation, therefore, cannot be used to impose personal liability upon the beneficiary. *Id.*

<sup>108</sup> 347 F3d 619 (6th Cir 2003).

<sup>109</sup> *Id.* at 624 (holding that the court lacked jurisdiction because the plaintiff "did not . . . allege that it had given certain funds to [the defendant], trace those funds to the settlement funds . . . and seek the return of the settlement funds").



Given the interpretation of *Knudson* by lower courts and ERISA's broad preemptive power, an ERISA fiduciary's options for reimbursement from a double-collecting beneficiary are limited at best.<sup>110</sup> After *Davila* one might assume that ERISA would preempt a state law breach of contract claim for reimbursement, leaving the fiduciary without any remedy at all. The next Part argues that the Court's ERISA preemption jurisprudence allows such a cause of action to survive.

### III. ERISA PLAN FIDUCIARIES SHOULD BE PERMITTED TO BRING STATE LAW BREACH OF CONTRACT CLAIMS FOR REIMBURSEMENT

The Supreme Court's preemption jurisprudence can be interpreted to permit ERISA fiduciaries to bring state law breach of contract claims for reimbursement against double-collecting ERISA beneficiaries. In *Knudson* the Supreme Court clearly ruled out the possibility of future reimbursement actions by plan fiduciaries against beneficiaries under ERISA (by any means other than a constructive trust or equitable lien),<sup>111</sup> but it intentionally expressed no opinion as to whether ERISA would preempt an action by a plan fiduciary asserting state law claims, such as breach of contract, against a plan beneficiary.<sup>112</sup> The following discussion considers the question in light of the Court's overall ERISA preemption jurisprudence and concludes that a state law breach of contract claim could and should escape ERISA preemption.

Part III.A demonstrates that ERISA provides no cause of action for fiduciaries seeking reimbursement under a breach of contract theory. Part III.B argues that the preemption question should be considered in light of the entirety of the Supreme Court's ERISA preempt-

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<sup>110</sup> Even under the most liberal interpretation of *Knudson* (something akin to the Fifth Circuit's approach in *Bombardier*), a beneficiary who double recovers could effectively shield funds from fiduciaries seeking reimbursement under ERISA simply by making the funds "unidentifiable." Among the courts that have denied recovery in the reimbursement actions thus far discussed, *Knudson* among them, all have held that the basis for the ERISA fiduciary's reimbursement claim was a legal claim for which ERISA provides no relief. See, for example, *Knudson*, 534 US at 214 (holding that plaintiffs sought "not equitable . . . but legal" restitution); *Westaff*, 298 F3d at 1167 (referring to *Knudson*'s finding of legal restitution and stating that "[t]he action [at issue] remains one for money damages").

<sup>111</sup> Because the Court construes both "equitable lien" and "constructive trust" so narrowly in *Knudson*, it is unlikely that either will be a viable option for plan fiduciaries seeking reimbursement for benefits paid. See *Knudson*, 534 US at 213-14 (allowing these theories only "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession").

<sup>112</sup> See *id.* at 220 ("We express no opinion as to . . . whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been preempted by ERISA.").

tion jurisprudence and not merely in light of the most recent case, *Davila*. Part III.C analyzes the state law reimbursement claims in light of the overall ERISA preemption jurisprudence, noting an impasse on the question of whether reimbursement agreements significantly affect the calculation of ERISA benefits. Part III.D looks to the effects of denying a remedy to ERISA fiduciaries in order to break the deadlock, concluding that those effects favor allowing fiduciaries to bring state law breach of contract claims against double-collecting beneficiaries.

A. ERISA Provides No Cause of Action for Plan Fiduciaries  
Seeking Reimbursement Under a Breach of Contract Theory

An ERISA fiduciary's breach of contract claim for reimbursement is one for which ERISA provides no cause of action, meeting one of the statute's criteria for nonpreemption. The Supreme Court explicitly stated that a person's cause of action is completely preempted if, at some point in time, that person could have brought his claim under ERISA.<sup>113</sup> In other words, for a claim to survive preemption by ERISA, it is necessary but not sufficient that ERISA provide no cause of action for the claim. Because ERISA affords equitable relief in § 502(a)(3), an ERISA fiduciary could not bring an equity-based claim for reimbursement under state law.<sup>114</sup> To escape preemption, then, any state law claim must be at-law.<sup>115</sup> A fiduciary could not bring a state law breach of contract claim under ERISA because ERISA provides no cause of action for claims seeking legal remedies.

ERISA might provide a cause of action for (and therefore preempt) state law breach of contract actions which can be characterized as claims for equitable relief, but such cases do not alter ERISA's preemptive effect upon true legal claims. Because ERISA's civil enforcement provision contemplates equitable relief, a state at-law cause of action will not escape preemption if it can accurately be characterized as a claim for equitable relief. *Mertens* and *Knudson* involved causes of action characterized by the parties as equity-based claims but deter-

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<sup>113</sup> *Davila*, 124 S Ct at 2496.

<sup>114</sup> See *id* ("Thus, the ERISA civil enforcement mechanism is one of those provisions with such extraordinary pre-emptive power that it converts an ordinary state common law complaint into one stating a federal claim.") (internal citation and quotations omitted). This conclusion is consistent with ERISA's purpose of providing a uniform regulatory regime over employee benefit plans and its reason for including such admittedly expansive preemption provisions. See *id* at 2495.

<sup>115</sup> Any possibility of bringing "disguised" at-law claims under ERISA is, of course, foreclosed by *Mertens* and *Knudson*—the narrow construction of "equitable relief" in those cases excludes the possibility of reimbursement under ERISA. See *Mertens*, 508 US at 256 (reading "equitable relief" in § 502(a)(3) to mean only relief "typically available in equity"); *Knudson*, 534 US at 221 (citing *Mertens* and stressing deference to Congress).

mined by the Court to be at-law.<sup>116</sup> The Court could consider a cause of action brought in state court to be an at-law claim to be an equity-based claim if it is possible to form a constructive trust or equitable lien theory of recovery for that claim. If a court or plan beneficiary successfully construed a fiduciary's breach of contract or restitution claim as an equitable claim (one seeking "not to impose personal liability on the [beneficiary], but to restore to the [fiduciary] particular funds or property in the [beneficiary's] possession"<sup>117</sup>), the cause of action is one that could have been brought under ERISA § 502(a)(3). Such a claim would be preempted under *Davila* because it "falls within the scope of ERISA" and must be brought under ERISA or not at all.<sup>118</sup>

Even if some state at-law claims can be recharacterized as equitable claims that must be brought under ERISA, this is not possible for every state action. Unless permitted to bring state law breach of contract claims, at least some, if not many, ERISA plan fiduciaries will be left with claims that would ordinarily be cognizable breach of contract claims and no venue in which to bring them. Though the Supreme Court's ERISA preemption and "equitable relief" jurisprudence could be interpreted so as to leave those fiduciaries without judicial recourse, that would be a policy decision by no means compelled by the case law and an ill-advised interpretation of the relevant statutes. The above discussion demonstrates that ERISA provides no cause of action for state law breach of contract claims, which therefore survive at least one level of preemption analysis.<sup>119</sup>

## B. ERISA's Entire Preemption Jurisprudence—Not Just *Davila*—Must Be Considered

The question of preemption of state law breach of contract claims for reimbursement should be considered in light of the entirety of the

<sup>116</sup> See *Mertens*, 508 US at 255 ("Petitioners maintain that the object of their suit is appropriate *equitable* relief . . . . They do not, however, seek a remedy traditionally viewed as equitable.") (internal quotation marks omitted); *Knudson*, 534 US at 210–11 ("[P]etitioners argue that they are entitled to relief under § 502(a)(3) . . . . But an injunction to compel the payment of money past due under a contract, or specific performance of a past due monetary obligation, was not typically available in equity.").

<sup>117</sup> *Knudson*, 534 US at 214.

<sup>118</sup> See *Davila*, 124 S Ct at 2496. This conclusion is consistent with the Court's holding in *Davila* that "distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would elevate form over substance and allow parties to evade the pre-emptive scope of ERISA simply by relabeling their . . . claims." *Id.* at 2498 (internal quotation marks omitted). Indeed, the Court has on at least one occasion ruled that a state cause of action "was pre-empted because it attempted to convert an equitable remedy into a legal remedy." *Id.* at 2499, citing *McClendon*, 498 US 133.

<sup>119</sup> See *Davila*, 124 S Ct at 2496 (requiring preemption when a plaintiff could have brought a claim under ERISA and "there is no independent legal duty that is implicated").

Supreme Court's ERISA preemption jurisprudence and not merely in light of the most recent case, *Davila*. In *Travelers*, the Court professed to retreat from its stance supporting expansive ERISA preemption powers. Its justification for this shift was that its previous approach seemed limitless: "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course, for really, universally, relations stop nowhere."<sup>120</sup> Extraordinarily literal interpretation of the Court's language in *Davila* might create the same concern: the range of state law causes of action that may "duplicate, supplement, or supplant the ERISA civil enforcement remedy" is itself nearly limitless given a sufficiently literal interpretation of "duplicate, supplement, or supplant."<sup>121</sup> ERISA's preemption provision states that ERISA shall supersede "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."<sup>122</sup> An overly literal interpretation of the preemption provision should be avoided as it would have profound consequences and represent a substantial step back toward the jurisprudence *Travelers* rejected.

Proper interpretation of the Court's precedent disposes of a formalistic objection to this conclusion. The formalistic argument proceeds this way: because the state law reimbursement claim depends upon the existence of an ERISA-regulated contractual agreement, it "relates to" ERISA sufficiently to justify preemption, even though judicial resolution of the complaint does not directly affect the disposition of benefits. This argument seems supported by occasional reference in Supreme Court case law to causes of action preempted because they depend upon the existence of an ERISA benefit plan.<sup>123</sup> The cases alluded to, however, preempt causes of action that are premised entirely upon (and could not exist without) ERISA benefit plans *in particular*, not causes of action arising from regulated relationships that simply happen to include ERISA benefit plans.<sup>124</sup> In other words,

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<sup>120</sup> *Travelers*, 514 US at 655 (internal quotation marks omitted).

<sup>121</sup> See *Davila*, 542 US at --, 124 S Ct at 2495 ("[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."). Note that Justice Souter, the author of the unanimous opinion in *Travelers*, joined in the majority opinion in *Davila*.

<sup>122</sup> 29 USC § 1144(a).

<sup>123</sup> See, for example, *DeBuono*, 520 US at 814–15 (stating that ERISA would preempt a state law cause of action when "the existence of a [benefit] plan is a critical element of a state-law cause of action").

<sup>124</sup> See, for example, *McClendon*, 498 US at 139–40 ("We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan. . . . Here, the existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law.").

the Supreme Court has held preempted state laws that regulate *only* (or, arguably, primarily) ERISA benefit plans such that causes of action arising under those laws are dependent upon the plans' existence. Though the Court has never said as much explicitly, this hard and fast rule likely grew out of a strong presumption that any law expressly referring to ERISA would substantially affect the calculation or administration of benefits.<sup>125</sup> To the extent that state contract laws make no explicit mention of ERISA plans and do not rely upon their existence to create causes of action, regulation of the reimbursement agreements at issue here will not be preempted by this line of cases.<sup>126</sup>

### C. Contractual Reimbursement Agreements in Light of ERISA's Entire Preemption Jurisprudence

The Supreme Court will strike down as preempted an ERISA fiduciary's state law breach of contract claim for reimbursement if the reimbursement provision at issue significantly affects the calculation or administration of ERISA benefits.<sup>127</sup> Under one view, a claim for reimbursement does not affect benefit calculation or administration in the slightest. Under this approach, the benefits are calculated and distributed to the plan beneficiary before the beneficiary collects from the third party. Once those benefits have been received by the beneficiary, all calculation and administration of benefits is complete. Any subsequent dispute over reimbursement under the agreement between the beneficiary and the fiduciary is unrelated to benefit calculation or administration; therefore a dispute over reimbursement under state law would not be preempted. Under the opposite view, determining what amount of benefits previously paid to the beneficiary must

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<sup>125</sup> See, for example, *Mackey v Lanier Collection Agency & Service, Inc.*, 486 US 825, 829 (1988) (holding that ERISA preempted a state law "which single[d] out ERISA employee welfare benefit plans for different treatment under state garnishment procedures").

<sup>126</sup> In the only Supreme Court case to directly confront the question of whether reimbursement "relates to" an ERISA plan, the Supreme Court based its conclusion upon an explicit mention of ERISA-regulated plans in the antisubrogation statute at issue. See *FMC Corp v Holliday*, 498 US 52, 59 (1990) (holding that "Pennsylvania's antisubrogation law 'relates to' an employee benefit plan" because it "has a 'reference' to benefit plans governed by ERISA"). The Court also relied heavily on the broad language in *Shaw* that *Travelers* rejected. See *id.* at 58–59. Even if the Court were to sustain this part of *Holliday*'s holding today, the holding's applicability would be limited to laws explicitly mentioning ERISA regulated plans. Note also that *Holliday*'s holding with regard to the "relates to" analysis ultimately allowed the fiduciary to bring its reimbursement claim by preempting the antisubrogation law. See *id.* at 65. Compare *Holliday* with the law at issue in *Singh v Prudential Health Care Plan, Inc.*, 335 F3d 278, 284 (4th Cir 2003) (citing *Holliday* for the proposition that state antisubrogation laws "relate to" employee benefit plans), in which both parties conceded that the antisubrogation law at issue "related to" an ERISA regulated benefit plan.

<sup>127</sup> See Part II.A.3.

be reimbursed is a part of the ERISA benefit calculation. A dispute over reimbursement, then, substantially affects the calculation or administration of benefits and is preempted by ERISA.

The courts of appeals to consider this question have opted for the latter approach, but supply no reason as to why this approach is mandated or preferred.<sup>128</sup> The Fifth Circuit's consideration of this question in *Arana v Ochsner Health Plan*<sup>129</sup> is illustrative. Plaintiff Arana sought a judgment declaring that Ochsner was not entitled to reimbursement of any portion of the benefits Ochsner paid Arana prior to Arana's collection from a third party, despite the existence of a reimbursement provision.<sup>130</sup> The panel noted that Arana had been paid all benefits due to him<sup>131</sup> and cited *Knudson* as support for denying Arana's claim for ERISA protection on the ground that the claim was merely "akin" to a suit to enforce the terms of the ERISA plan.<sup>132</sup>

Upon rehearing en banc, the court ruled that Arana's claim could fairly be characterized as a claim to recover benefits due under the ERISA plan.<sup>133</sup> In support of this conclusion, the court offered the following statement: "It could be said, then, that although the benefits have already been paid, Arana has not fully 'recovered' them because he has not obtained the benefits free and clear of [Ochsner's] claims."<sup>134</sup> No further analysis was offered as to why this conclusion is

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<sup>128</sup> See, for example, *Arana v Ochsner Health Plan*, 338 F3d 433, 438 (5th Cir 2003) (en banc) (holding that a beneficiary's claim to recover benefits reimbursed to the ERISA fiduciary could "fairly be characterized as [ ] a claim to recover benefits due to him under the terms of his plan") (internal quotation marks omitted); *Lyons v Philip Morris, Inc.*, 225 F3d 909 (8th Cir 2000) (holding that reimbursement claims by ERISA fiduciaries against tobacco companies were preempted to the extent that the claims were premised upon the recovery of health benefits paid by ERISA plans).

<sup>129</sup> 302 F3d 462 (5th Cir 2002), revd, 338 F3d 433.

<sup>130</sup> *Arana*, 302 F3d at 466. Note that the court was somewhat reluctant to consider the reimbursement provision part of the ERISA plan at issue. See *id.* at 471–72. It is tempting to argue that reimbursement provisions are not part of ERISA plans at all (which would mean that adjudication of the provisions would not be preempted by ERISA). Under this view "the plan" is simply that portion of the relevant documents which describes the calculation and administration of benefits, while the reimbursement provision is an independent obligation—a function of plan funding. Indeed, at least one Supreme Court opinion arguably lends support to this view. See *Pegram v Herdrich*, 530 US 211, 223 (2000) ("Rules governing collection of premiums, definition of benefits, submission of claims, and resolution of disagreements over entitlement to services are the sorts of provisions that constitute [an ERISA] plan."). It is practically impossible that the Supreme Court would hold that the reimbursement provisions are not actually part of the benefit plans, however, because such an interpretation would foreclose the possibility of equitable recovery for breach of a reimbursement agreement under ERISA, which is unquestionably approved of in *Knudson*. See 534 US at 213 ("[A] plaintiff could seek restitution *in equity*.").

<sup>131</sup> See *Arana*, 302 F3d at 472 n 10.

<sup>132</sup> *Id.* at 472.

<sup>133</sup> See *Arana*, 338 F3d at 438.

<sup>134</sup> *Id.*

mandated or preferred over the panel's decision (though some Fifth Circuit precedent yielding similar conclusions was cited).<sup>135</sup>

Neither unassisted logic nor ERISA itself requires a court to favor one approach to this problem over another, yet it is essential to the ERISA preemption analysis that an approach be chosen. If a claim for reimbursement is considered a claim for benefits, the reimbursement claim substantially affects the calculation and administration of ERISA benefits and is preempted. The following Part argues that a claim for reimbursement should not be considered a claim for benefits and, consequently, that the reimbursement claim is not preempted.

#### D. The Negative Effects of Preempting Breach of Contract Claims Suggest That the Claims Should Be Permitted

To escape the logical deadlock noted above, it is permissible to consider the effects of preemption of the claim at issue (and other claims like it). In *Travelers* and other cases, the Supreme Court expressly considered the effects of its decision in its preemption calculus.<sup>136</sup> The weight of those effects is not made explicit, but the case law suggests that the more serious and widespread the effects of preemption, the less likely the Court will find a state law preempted.<sup>137</sup> The negative effects of preempting state law reimbursement actions by fiduciaries argue against interpreting reimbursement provisions to significantly affect the calculation or administration of ERISA benefits.

Reimbursement provisions exist to control the cost of providing insurance.<sup>138</sup> Not allowing fiduciaries to enforce them will result in either (1) a general increase in rates in order to recoup losses to double-collecting beneficiaries who refuse to reimburse the plan as per their contractual obligations or (2) a delay in the initial payment of benefits to accident victims as insurers "wait and see" if the beneficiary will

<sup>135</sup> See *id.* at 438 n.8.

<sup>136</sup> See *Travelers*, 514 US at 664–65 (considering the effects of preempting a state law upon the state's ability to regulate hospital costs). See also *Massachusetts v. Morash*, 490 US 107, 118–19 (1989) (considering the "profound consequences" of treating routine vacation pay policies as a part of ERISA-regulated benefit plans, including the displacement effects on state laws currently regulating those pay policies).

<sup>137</sup> See *Travelers*, 514 US at 661:

The bigger the package of regulation with indirect effects that would fall on the [beneficiaries'] reading of § 514, the less likely it is that [it is correct] . . . . [T]o read the pre-emption provision as displacing all state laws affecting costs and charges on the theory that they indirectly relate to ERISA plans . . . would effectively read the limiting language in § 514(a) out of the statute.

<sup>138</sup> See *In re Paris*, 2000 US App LEXIS 6883, \*8–9 (4th Cir.) ("Subrogation is an extremely important tool for maintaining the financial viability of [self-funded ERISA] plans").

collect from a third party before committing funds.<sup>139</sup> These changes are adverse to the interests of plan beneficiaries, the parties whom ERISA is primarily intended to protect.<sup>140</sup> The negative effects of prohibiting the state law claims of ERISA fiduciaries suggest that the preferable interpretation of the reimbursement provisions should not consider them to substantially affect the calculation or administration of ERISA benefits.

### CONCLUSION

The Supreme Court could formalistically interpret its most recent precedent to forbid state law reimbursement claims by ERISA fiduciaries against double-collecting beneficiaries, but it ought not do so. Confronted with precedent that does not compel either conclusion, the Court ought to consider the at-law reimbursement claims in light of ERISA's purpose of protecting plan beneficiaries and the Court's own move away from excessively literal interpretation of ERISA's preemption provision. So doing will eliminate the possibility of the "regulatory vacuum" that Justice Ginsburg fears and establish an administrable, predictable system.

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<sup>139</sup> See Lisa N. Bleed, Comment, *Enforcing Subrogation Provisions as "Appropriate Equitable Relief" Under ERISA Section 502(a)(3)*, 35 USF L Rev 727, 747 (2001) (arguing before *Knudson* that public policy supported enforcing reimbursement provisions as "equitable relief," in part because "[i]f reimbursement-type subrogation provisions are not enforceable . . . a plan fiduciary's only choices will be to either include *exclusionary* provisions or no subrogation provisions at all (thus driving up the cost of providing the benefits)—in either case, [beneficiaries] are ultimately harmed by a loss of benefits"). But see Baron, 55 Mercer L Rev at 620–30 (cited in note 72) (arguing that the insurers receive a windfall through subrogation and that denying reimbursement will have little or no impact upon insurance rates because subrogated recoveries presently are not reflected in the setting of rates). The "wait and see" approach is unlikely given the high administrative costs of the system relative to the alternative plan of simply raising insurance rates. Furthermore, if given the choice between insurance providers using the "wait and see" approach and those with slightly higher rates, insurance customers (including employers whose desire to pay lower fees is countervailed by a desire to attract high quality employees who care about when benefits will be distributed) will likely prefer paying higher rates in exchange for prompt compensation in the event of injury. The "wait and see" approach, if widely implemented, however, would likely alter the administration of ERISA benefits sufficiently to justify an argument that subrogation provisions "relate to" ERISA in the relevant sense.

<sup>140</sup> See 29 USC § 1001(a). The relatively consistent enforcement of contractual obligations from state to state should also soothe concerns that allowing fiduciaries to bring the state actions will subvert uniformity. But see Baron, 55 Mercer L Rev at 626 (cited in note 72) ("Given the intrusive and unfair nature of subrogation in the area of personal injury claims, not surprisingly at least one state supreme court has declared statutory provisions permitting such subrogation to be unconstitutional.").